

## **Apples vs. Persimmons — Let's stop drawing inappropriate comparisons between the legal professions in Japan and the United States**

Richard S. Miller\*

---

*In this article Richard Miller compares elements of the structures of the legal profession and legal education in Japan and in the United States, and also compares the relative ease of litigating in the two nations. Based on the differences, he concludes that the current tendency to compare the number of lawyers in the United States with the small number of bengoshi, licensed barristers, in Japan as a basis for attacking or ridiculing the American legal system is unfair and inappropriate. However, Professor Miller does describe some features of each nation's legal arrangements which might fruitfully be considered for adoption by the other.*

---

A few years ago, in an essay sharply critical of the American legal profession, Harvard's President Derek Bok drew an invidious comparison between the number of lawyers in Japan and the number in the United States.<sup>1</sup> Since then it has become *de*

---

\* Professor of Law, William S. Richardson School of Law, University of Hawaii. Visiting Professor, Victoria University of Wellington, January-June 1987.

This article was written as the result of the author's participation in a faculty exchange between the Hiroshima University Faculty of Law and the University of Hawaii's Richardson School of Law. Funding for the exchange was provided by a United States Information Agency University Affiliation Program grant as well as by both participating law schools. The author visited Hiroshima from 26 August 1986 to 12 January 1987.

I am particularly grateful for the assistance provided by my colleagues in Hiroshima, Professors Hiroyuki Hata, Iwao Hirata, Haruhiko Katagi, Koji Kontani, Tsueneo Matsumoto, and Attorneys Takafumi Sato and Rokuji Shiinoki. They not only furnished me with much information and many insights about the legal profession and legal education in Japan, but they also saw to it that I observed the work of the Japan Center for Settlement of Traffic Accident Disputes, attended a civil trial for damages arising out of an automobile accident, met with and interviewed notaries public in their office, interviewed a judicial scrivener about the nature of the work of his profession, and insured that my discussions were accurately interpreted. I am also in debt to Professor Matsumoto for affording me the privilege of co-teaching his Civil Law course and to Attorney Sato and Professor Hata for reading an early draft of this article and offering corrections and comments.

In spite of all this help, I take full responsibility for the ideas and conclusions expressed in this article.

<sup>1</sup> Bok "A Flawed System of Law Practice and Training" (1983) 33 J. Legal Educ. 570, 571, 573-75.

*rigueur* for other critics of the American legal system — and especially of the American system of tort law — to draw the same comparison. It is the thesis of this article that there are such profound differences between the professions and between the factors affecting the professions in the two nations that such comparison is perniciously misleading and unfair to the American legal profession — like comparing apples with similar-seeming but very different persimmons (*kaki*), one of Japan's favourite fruits.

Since the organisation of the New Zealand legal profession and the Common Law tradition it shares with the United States — albeit with important differences — brings it much closer in form and function to the American legal profession than to the civil law based Japanese system, many of the differences from the Japanese system discussed here are relevant to New Zealand.

## **I. REASONS FOR THE APPARENT DISPARITY IN THE NUMBERS OF LAWYERS**

There may very well be about 650,000 licensed lawyers in the United States and only about 13,000 *bengoshi* (licensed litigators) in Japan.<sup>2</sup> The differences which account for this apparently shocking statistic, however, are manifold. And first among them, of course, is that the population of Japan is half that of the U.S. Any comparison of numbers, therefore, must be made in relative rather than absolute terms. But even this adjustment leaves about twenty-five times more licensed lawyers, per capita, in the U.S. than in Japan.

Much more important, however, are the differences in the ways the professions of law are organized in the two nations. In the United States, licensed lawyers engage in an extremely wide range of "practice" activities. These include civil litigation, prosecuting and defending criminal cases, general and specialized legal advising, estate planning, drafting of documents, business planning, and engaging in any number of other specialized practices such as administrative law, tax, domestic relations, patent and copyright, anti-trust, and admiralty. Lawyers also teach law and serve as judges in courts and administrative agencies at both the state and federal levels. Furthermore, many licensed lawyers, either by choice or by necessity, engage in activities entirely outside the usually understood limits of the legal profession. They may, and often do, become teachers, public administrators, business executives, real estate brokers, full-time investors, F.B.I. officers, salesmen and saleswomen, musicians, playwrights, poets, and politicians. How many of the 650,000 licensed attorneys are actually engaged

2 As of November, 1986 there were 13,142 *bengoshi*. Monthly Newspaper, Japan Federation of Bar Associations, 21 Nov., 1986. Also see the statistics in Brown "A Lawyer By Any Other Name: Legal Advisors in Japan" in Practising Law Institute, *Legal Aspects of Doing Business in Japan 1983*, at 201,479 (1983). It has been noted that in the 1970s New Zealand was second to the United States in the per capita level of lawyers, but that the U.S. per capita rate was twice that of New Zealand. Samuelson "The Litigation Explosion: The Wrong Question" (1986) 46 Maryland L.Rev. 78, 79.

in what might reasonably be called the practice of law is a matter of considerable doubt;<sup>3</sup> what cannot be doubted, however, is that many of them are not so engaged.

On the other hand, in Japan the people Americans tend to identify as licensed lawyers, *bengoshi*, are members of but one of several licensed legal professions. As distinguished Hiroshima *bengoshi* Rokuji Shiinoki has pointed out, they are a "midway type mixed breed of an English barrister and solicitor." And they are the only group licensed to try all kinds of contested cases in court. There are, however, several other legal "professions" whose members are licensed to handle matters which in the U.S. would be handled only by licensed lawyers.<sup>4</sup> Closest to the *bengoshi* in function are the 15,000 *shiho shoshi*, or judicial scriveners. They may not try law suits but they draft and register legal documents, mainly real estate and incorporation, and they give legal advice on a range of matters as broad as that given by any general practitioner in the U.S. It is especially interesting to note that they even give advice on civil procedure to a surprisingly large percentage of parties who litigate pro se because they do not want or cannot afford a *bengoshi*. Because of the overlap of functions between *bengoshi* and *shiho shoshi*, there are ongoing disputes as to whether each is unlawfully engaged in the practice of the other's profession.

There are also 502 *koshonin*, or notaries public, who perform some lawyers' functions. They are composed of retired judges and retired members of the Ministry of Justice who, in 309 offices in Japan, prepare documents at the request of parties who have agreed in advance to their substance and insure that the documents conform to law; prepare and see to the execution of certified deeds, especially for loan transactions; and prepare other notarial deeds which are required or permitted by Japanese law. For example, a certified deed providing for the welfare of a child may be used in an uncontested divorce by agreement.

3 President Bok asserted that 75 percent of licensed lawyers in the United States were engaged in the practice of law. See Bok, *supra* n. 1 at 573.

4 Ironically, one of the most comprehensive postwar studies of the Japanese legal system and legal profession, which clearly would have alerted President Bok to the difficulty of comparing the number of *bengoshi* with the numbers of licensed American lawyers, was edited by a member of the Harvard law faculty and published by Harvard University Press. A. T. Von Mehren, Ed. *Law in Japan: The Legal Order in a Changing Society* (1963). It still presents an excellent portrayal of the legal situation in Japan. Another very comprehensive but more recent survey is Brown, *supra* n. 2. Brown's article also contains an extended bibliography. *Id.* at 492-502. See also E. J. Hahn *Japanese Business Law and the Legal System* 9-30 (1984); Rokuji Shiinoki "The Legal Profession and the Practice of Law in Japan" in Proceedings of Japan-Hawaii Lawyers Conference, Aug. 1986; Haley "The Myth of the Reluctant Litigant" (1978) 4 J. of Japanese Stud. 359; Haley "Sheathing the Sword of Justice in Japan: An Essay on Law Without Sanctions" (1982) 8 J. Japanese Stud. 265; and Ramseyer "Lawyers, Foreign Lawyers, and Lawyer-Substitutes: The Market for Regulation in Japan" (1986) 27 Harv. J. Int'l. L. 499.

Most of the assertions in this article were drawn from these sources as well as being based upon the author's own observations and discussions with Japanese law professors and legal professionals.

Other licensed professionals who also engage in the handling of matters which in the U.S. would be handled by lawyers are approximately 2,600 *benrishi* (patent practitioners), 49,000 *zeirishi* (tax practitioners), and 30,000 *gyosei shoshi* (administrative scriveners).

However, it is no more appropriate to count each of these professionals as a full-fledged lawyer, for purposes of comparing the two legal systems, than it is to compare American licensed lawyers only with *bengoshi*. Suffice it to note that even after adjusting the figures to reflect the extent to which some individuals may be licensed in more than one of these professions, there are somewhere in the neighborhood of 100,000 licensed professionals in Japan who perform at least some of the services or functions performed in the U.S. only by licensed lawyers engaged in the practice of law.<sup>5</sup> It is thus possible to begin to understand how a dynamic and economically advanced society like Japan can function effectively with only 13,000 licensed *bengoshi*.

## II. WIDESPREAD USE OF UNLICENSED LEGAL EXPERTS IN JAPAN

But furthermore, there are many other persons in Japan who are not licensed, and indeed need not be licensed, but who are performing jobs which would ordinarily be performed in the United States only by licensed lawyers. Most obvious are the law professors. While law faculties in Japan include political scientists along with law professors, those who teach subjects which in the U.S. would be taught by law professors are seldom licensed to practice law. There are about 2,500 of these currently teaching in Japan. In the United States, of course, just about every one of the 5,000 or so law professors (not to mention candidates for advanced law degrees in residence in law schools) are members of the bar.

Particularly important to the comparison of the numbers of lawyers in Japan and in the U.S. are the thousands of non-lawyers in Japan who have earned their LL.B.s, who have been hired by corporations or by the government, and who perform functions which in the United States would be performed by lawyers.<sup>6</sup> To understand this group it is necessary to examine both the structure of legal education in Japan and the procedures for admission to the bar.

In Japan legal education, at least initially, is under-graduate education. The law degree (LL.B.) is a first university degree. Undergraduate students in Japan may concentrate in law just as students in the U.S. may major in English or Economics.

5 After adjusting the figures to avoid overlap — as where a licensed *bengoshi* also held a licence to practice as a *shiho shoshi* — Brown calculated that there were 88,532 licensed Japanese legal professionals (including judges and prosecutors) doing legal work in Japan in 1982. Brown, *supra* n. 2, at 479.

6 Brown conservatively estimated that there were 2,200 government in-house legal advisors and 6,000 corporate in-house advisors. Brown, *supra* n. 2, at 470. However, the methods of estimating these numbers is probably not accurate and the actual numbers of non-licensed in-house legal advisors may be much higher. See *Id.* at 332.

Many Japanese universities, public and private, have faculties of law which bear resemblance both to departments and to undergraduate schools and colleges in American universities.<sup>7</sup>

Many of the students who enrol in the Faculty of Law have no intention of becoming practicing lawyers or ever taking the bar examination.<sup>8</sup> They hope to gain employment in major corporations as executives or to become civil servants. Thus, for example, the University of Tokyo reports that for 1984 its law graduates (excluding political science majors) indicated their prospective occupations as follows:<sup>9</sup>

	Private Law Students		Public Law Students	
	Number	Per Cent	Number	Per Cent
Business	96	41	199	58
Civil Service	46	20	100	29
Law	31	13	1	—
Journalism	3	1	12	4
Foreign Service	5	2	3	1
Graduate Studies	6	3	5	2
Others*	46	20	22	6
TOTALS	233	100%	342	100%

\* Most students in this category reapply for the state examination and eventually become professional lawyers.

The most likely explanation for the relatively small percentage who express an interest in becoming *bengoshi* is the extraordinary difficulty of the Japanese bar examination and the horrendously low pass rate. In order to become a *bengoshi*, an applicant — whether a law graduate or not — must pass the national qualifying examination and then successfully complete a two-year program of instruction and apprenticeship in the Supreme Court supervised Legal Training and Research Institute. Of about 30,000 applicants who take the examination each year, only about 500 pass. The examination includes a grueling multiple-choice test which must first be passed, followed by a written and an oral examination. Many applicants study at special schools which offer courses designed to help them pass the examination, and many repeat the examination many times before passing.

7 A significant feature is that student must apply for, be accepted, and enrol in a "faculty," such as the Faculty of Law, and this faculty will then become the administrative and educational home of the student during his or her undergraduate years. In this respect a faculty more resembles an American university school or college than a department.

8 See McMahon, "Legal Education in Japan" (1974) 60 A.B.A.J. 1376. Some of the students taught by members of the faculty of law will be students who are enrolled in other faculties. At Hiroshima University, for example, students enrolled in the Faculty of Education are required to take a course in constitutional law sometimes taught by members of the Faculty of Law.

9 These figures are given in an informational pamphlet, *The Faculty of Law: The University of Tokyo*, which is available as a handout from the University of Tokyo Faculty of Law.

A second and reinforcing reason is that Japan's major corporations and the government will hire the best students directly from law school with only the bachelor's degree. It does not constitute a loss of prestige not to have taken and passed the national qualifying examination. Indeed, for those who have no intention of becoming judges, prosecutors, or practicing lawyers, taking the bar examination is an unnecessary burden.

Nevertheless, many of those who move into corporate Japan or into civil service will be called upon to serve as legal advisors and will, in that capacity, act very much like American lawyers who serve as house counsel or government attorneys. It is evidently not a violation of the law under which attorneys are licensed for unlicensed employees of an entity to give legal advice to the entity through its officers and employees.<sup>10</sup>

It is not known how many law graduates of Japanese universities employed by Japanese corporations and by governmental agencies are giving legal advice or acting like American lawyers within the corporate or governmental framework, but the number is likely to be considerable.<sup>11</sup>

Another area in which non-lawyers provide essential legal advice — to Japanese businesses in Japan and in other nations, as well — has recently been described by Richard Kanter,<sup>12</sup> an American lawyer who has served as a legal trainee in Japan and has been a strong advocate of opening Japan to American lawyers. Kanter notes that powerful Japanese trading companies, often at the cutting edge of international business, provide a considerable amount of what American lawyers would consider legal advice to companies exporting from and importing to Japan. Kanter notes: "These services overlap the trade facilitation services provided by American international lawyers to a remarkable degree. American lawyers thus serve much the same function in American business society as trading companies provide in Japanese business society."<sup>13</sup>

Notwithstanding the similarity of function, however, the American law firms are staffed by attorneys while, as Kanter points out, "trading company personnel, although often legally trained, are not licensed."<sup>14</sup>

Kanter calculates that there are 161 trading companies which employ over 60,000 Japanese throughout the world.<sup>15</sup>

Thus, although there is no way to make one-on-one comparisons of all the legal experts providing legal advice and services in Japan with all American practicing lawyers, it seems clear that the numbers of persons providing legal services in Japan is considerably greater than the small number of licensed lawyers and, indeed, after

10 See Brown, *supra* n.2, at 339.

11 See *supra* n.6.

12 Kanter "The Japan-United States Treaty of Friendship, Commerce and Navigation: Lawyers as Treaty Traders" (1986) 8 *U. Hawaii L. Rev.* 339.

13 *Id.* at 344-45 (footnotes omitted.)

14 *Id.* at 345.

15 *Id.* at 344, n. 28.

adjusting for population differences may begin to approach the number of licensed lawyers engaged in some form of law practice in the United States. This could hardly be otherwise, since both societies are heavily regulated and bureaucratized and since contemporary life in both nations necessarily requires trained advisors, licensed or not, who can guide participants in the transactions of a complex society through a labyrinth of law and legal regulations.

It therefore seem disingenuous, in the extreme, to compare the number of American lawyers with the number of *bengoshi* as a way to establish that the United States is over-lawyered.

### III. REASONS FOR DIFFERENCES IN THE AMOUNT OF LITIGATION

Nevertheless, it is pretty much agreed that there are considerable differences in both the number of professionals licensed to litigate in the two societies and the volume of litigated cases.<sup>16</sup> While some have attributed the differences in amount of litigation to an asserted absence of "rights consciousness" on the part of the Japanese or upon their overarching cultural proclivity to maintain "harmonious" relations with their fellow citizens, neither factor may be as significant today as it once was. Indeed, Hiroyuki Hata, distinguished Professor of Comparative Constitutional Law and Dean of Law at Hiroshima University, has stated that whatever may have been the case immediately after World War II, the Japanese no longer lack rights consciousness; rather, he asserts that urbanization and industrialization have brought with them "an excessive demand for rights."<sup>17</sup>

How, then, to account for the fact that there are far fewer law suits per capita in Japan than in the U.S.? There seem to be several reasons. First, there may be far fewer transactions of the kind most likely to generate law suits. For example, although Japan has about half the population of the United States, its automobile accident death rate is only slightly above 9,000 per year,<sup>18</sup> about one-fifth of the U.S. annual rate of close to 50,000 deaths! The explanation probably can be found in major differences in driving patterns in the two nations. It is likely that far fewer miles are driven by the average person in Japan than in the U.S., largely as a product of higher driving costs — heavy

16 For example, there were only 387,000 civil lawsuits filed in Japan in 1979 as compared to 1,990,000 in England for the same year. See E. J. Hahn, *supra* note 4, at 14-16. In the United States, during the same year, there were 154,700 civil suits filed in the federal courts and 5,959,300 filed in the state courts. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1986* (106th ed. Washington, D.C. 1985) 179-80.

Brown notes that there were 11,745 *bengoshi* in 1982. Brown, *supra* n. 2, at 479. In 1980 there were 542,205 lawyers in the United States. U.S. Bureau of the Census, *supra*, at 177.

17 Hata, *The Legal Profession and the Practice of Law* at 1, in Proceedings of Japan-Hawaii Lawyers Conference, August, 1986 (unpublished, copy in Law Library, The William S. Richardson School of Law, University of Hawaii.) See also Haley "The Myth of the Reluctant Litigant (1978) 4 J. of Japanese Stud. 359. But cf., Tanaka "The Role of Law in Japanese Society: Comparison With The West" (1985) 19 U. B. C. L. Rev 375).

18 There were 9,317 traffic deaths in Japan in 1986. See the Japan Times, p. 2, col. 7, Jan. 6, 1987.

traffic, high-priced fuel, outrageously high highway tolls, serious parking problems —and excellent public transportation.<sup>19</sup> There may also be more effective programs of accident prevention in Japan. Whatever the causes, however, such large differences in accident statistics must necessarily yield vast differences in the volume of accident litigation.

Another important reason may be that Japan is only now beginning to experience the growth of court-enforceable rights which in the United States grew like Topsy beginning mainly with the Warren court. A law providing equal employment rights for women has only recently been adopted<sup>20</sup> and the first suits under it have just been decided at the trial level. But most controversies which in the U.S. would be brought to court based upon well-established legal principles prohibiting discrimination and other violations of civil liberties and civil rights are still being disputed principally in non-judicial arenas in Japan or left to fester. Most prominent of the latter are claims of discrimination by minority groups — the Ainu, Burakumin, and Koreans.<sup>21</sup>

Perhaps the principal reason why litigation in Japan is not a favored method of resolving disputes is that there are built-in barriers of considerable dimension. First, court filing fees to commence law suits are on a statutory sliding scale which increases with the size of the claimed amount, as follows:<sup>22</sup>

	Amount of Claim			
	Up to Y300,000	Over Y300,000 up to Y1 mill.	Over Y1 mill. up to Y3 mill.	Over Y3 million *****
FEE	Y100 for each Y10,000	Y80 for each Y10,000 plus Y600	Y70 for each Y10,000 plus Y1,600	Y50 for each Y10,000 plus Y7,600

19 Brown also notes that in some large Japanese cities, an automobile registration cannot be obtained without proof that the applicant has a parking space for the car.

20 See the Japan Times, p. 2, col. 5, Jan. 6, 1987.

21 Descendants of the Ainu, a group which may have occupied much of Japan before descendants of the current Japanese arrived, are now located mainly on the northern island, Hokkaido. Some Ainu claim to be discriminated against in Japanese society and some of their representatives expressed considerable dismay when the present government reported to the U.N. that no racial minorities suffering discrimination existed in Japan.

Residents of Japan of Korean descent are treated as aliens and are required to get fingerprinted in order to have compulsory alien registration cards issued. The fingerprinting requirement has been elevated to a human rights issue and a *cause celebre* by Koreans who evidently cannot become Japanese citizens no matter how many generations have lived in Japan because Japanese nationality can only be acquired through the nationality of one's father.

Burakumin, although racially indistinguishable from most of the Japanese, claim that they are discriminated-against out-castes in Japanese society. See Wetherally, Book Review, "Is There a Permanent Subclass in Japan?", The Japan Times, p. 8, col. 1, Dec. 26, 1986.

22 This chart and its translation was furnished courtesy of Professor Koji Kontani, Hiroshima University Faculty of Law. It is based on the *Tesuryogaiyo* (Commission Summary).



Thus, for example, if it be assumed that US\$1.00 = Y160<sup>22a</sup>, the filing fee for a US\$1 million (Y160 million) law suit would be Y808,600, or \$5,047.50. The filing fee for a suit such as the much publicized Pinto suit, where plaintiffs were awarded US\$127,841,000 at the trial level,<sup>23</sup> would be at least US\$639,252.50!

Furthermore, in suits to recover money damages the claimant must pay his attorney an initial retainer fee as well as a fee contingent on success. These fees, which "may be ... respectively increased or decreased to the extent of 30% depending on the contents of the case," and otherwise adjusted for special circumstances, are based upon a percentage of the economic value of the claim and the economic benefit secured, respectively, as follows:<sup>24</sup>

	Initial Retainer Fee	Success Fee
Up to Y500,000	15%	15%
For the part over Y500,000 up to Y1 million	12%	12%
For the part over Y1 million up to Y3 million	10%	10%
For the part over Y3 million up to Y5 million	8%	8%
For the part over Y5 million up to Y10 million	7%	7%
For the part over Y10 million up to Y50 million	5%	5%
For the part over Y50 million up to Y100 million	4%	4%
For the part over Y100 million up to Y1 billion	3%	3%
For the part over Y1 billion	2%	2%

Based upon this schedule, which has been adopted by Nichibenren, the Japan Federation of Bar Associations, the initial retainer fee in a \$1 million law suit would ordinarily be Y6,645,000, or US\$41,531.25.

In view of these "up front" costs of a law suit based upon the amount claimed, a would-be litigant would either have to be indigent and thus eligible for free legal

22a For the purpose of translating these figures US\$1 can be taken to equal NZ\$2.

23 *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 119 Cal. App. 3d 757 (1981) (rear-end collision which caused Ford Pinto to burst into flames; one victim died, the other lived but suffered permanently disfiguring burns over his entire body and face; jury award of \$125 million for punitive damages reduced to \$3.5 million; affirmed). If plaintiffs had originally sought more than the initial award, as they probably did, the filing fee, if the suit had been brought in Japan, would have been even higher.

24 Japan Federation of Bar Associations, Regulations Concerning the Standards for Attorneys' Fees, etc., Federation Rule No. 20, pp.2, 4, 12, 24 and 16, March 8, 1975, as amended May 26, 1984.

services or very wealthy before bringing a law suit and, especially, before seeking the levels of damages routinely sought in law suits brought in the United States. (In the United States, however, fees in civil suits may be made contingent on the success of the outcome. Although the claimant may pay a fee of from 25% to 50% of the recovery, no fee is payable unless the claimant prevails).

Another barrier is the nature of a Japanese civil law trial, in which examinations of individual witnesses are separately scheduled (and scheduled again weeks or months later if insufficient time is allowed for the first hearing,) where the same judge may not preside at the examination of all witnesses, and where great delays may occur before a verdict is reached.

Small wonder, then, that litigation is often a last resort in Japan; that if claimants litigate, they often do so without benefit of counsel, before helpful civil law judges;<sup>25</sup> and that non-judicial, non-coercive modes of resolving disputes, such as mediation, are often resorted to, also often without aid of counsel, before any thought is given to commencing suit.

There are other reasons, too, why non-judicial methods may be much more successful in Japan than in the United States. These are related to the absence of a right to jury trial and the career track and relative homogeneity of the Japanese judiciary. Since there is no jury to which a claimant can turn for a determination of the value of his case, it is possible for judges to develop standards, overtly or covertly, for valuing damages and even for setting degrees of comparative fault in recurring situations. Should lower court judges deviate too far from what may be considered appropriate standards, judicial review of facts, as well as law, on appeal may result in greater conformity, imposed by career judges who may share the conservative views and attitudes of each other and of the party which has long ruled Japan and whose cabinet has appointed them, the LDP.<sup>26</sup> In any event, whatever the reasons may be, there is fairly widespread reliance on non-official schedules of damages and fault, developed principally by the Japan Federation of Bar Associations based on studies of actual decisions, in determining the value of a claim for purposes of a lawsuit and, most importantly, for purposes of settlement during mediation. Because of such schedules, positions taken by insurers and mediators tend not to vary widely from each other. Injured victims, usually without counsel and without recourse to completely open-minded fact-finders like jurors, are likely to accept a mediated settlement. This may help to explain why the highest settlement in an automobile accident case ever reported in Japan was Y140 million (about US\$875,000) in a case in which claimant was rendered a paraplegic.<sup>27</sup>

25 See Von Mehren, Commentary: Part I, in A. T. Von Mehren, Ed., *op.cit.* supra n. 4, 194-195. But cf. J. H. Merryman, *The Civil Law Tradition* (Stanford U.P., 1969) 123-124.

26 According to Brown, "Full judges are officially appointed by the Cabinet from a list of names prepared by the Supreme Court. The Chief Justice of the Supreme Court is appointed by the Emperor as 'designated by the Cabinet', while the other Supreme Court justices are merely appointed by the Cabinet." (Footnotes omitted.) Brown, *supra* n. 2, 290.

27 Chugoku Shimbun, Nov. 15, 1986.

Thus, it is a series of significant factors, such as those just described, as well as many subtle cultural distinctions and other differences in the two systems, which account for the relative rarity of law suits in Japan as compared with the U.S., and for generally far lower monetary awards.

#### IV. MORE USEFUL COMPARISONS

While direct comparisons of statistics regarding numbers of lawyers and numbers of law suits, without full explanation of the causes of the differences, should be scrupulously avoided, there are features of both nation's legal systems which may be worth comparing and, possibly, emulating.

Here are some worthy ideas which the United States might well try adapting from the Japanese:

1. Japanese motorists are required to purchase liability insurance in the amount of about US\$125,000. Many auto owners, perhaps 40 per cent, buy optional additional coverage, and about 26 per cent have insurance with no liability limits. Thus, with accident awards and settlements being much lower than in the United States (and with the government providing insurance in the case of uninsured motorists,) almost all awards will be fully covered by automobile liability insurance.

In the U.S. on the other hand, many states still do not require liability insurance and, in those that do, the amounts are often insufficient to cover damages in serious accidents.

One of the great virtues of the Japanese system of requiring insurance adequate to cover most awards is that it pretty well eliminates the problem caused by joint and several liability where, as is common in the U.S., victims can only recover a small portion of their damages from auto owners and drivers, or their insurers, and must seek to join "deeper pocket" defendants, who may end up paying a disproportionate share of auto accident damages.

2. Though the causes may be inexorably linked to the dissimilar features of the Japanese legal and judicial systems described above, or to other more complex cultural attitudes and historical differences, the fact is that many more disputes are settled non-judicially, through what are today called "alternative modes of dispute resolution," in Japan than in the United States. These evidently have been used commonly to resolve all manner of disputes, including those involving human rights and liberties, consumers' rights, environmental protection, construction contracts, intellectual property, and traffic accidents. In many of these areas special commissions or centers have been established.

By way of interesting, and possibly suggestive, example, the Japan Center for Settlement of Traffic Accident Disputes was established in 1974, supported by funds provided by the liability insurance industry.<sup>28</sup> Accident victims may come to the

<sup>28</sup> See Pamphlet, *Japan Center for Settlement of Traffic Accident Disputes — its background & functions* (June, 1984). For those wanting additional information, the address of the Center is 25-1, Nishi-Shinjuku 1-chome, Shinjuku-ku, Tokyo.

Center, unrepresented, to assert their claims for damages if they are unable to settle their claims with claims adjusters. At the Center they will speak to a knowledgeable attorney employed by the Center, and an attempt will be made to mediate the dispute between the victim and the alleged accident causer. However, if the individual mediator cannot achieve agreement, the dispute may move to a three member "arbitration" panel. The arbitrators will hear the victim and the alleged culprit and will also examine police reports, which are heavily relied upon, but will ordinarily not hear other witnesses. The arbitrators will then recommend a settlement figure which the liability insurer, but not the victim, is bound to accept.

While the fact that the Center is supported by the liability insurance industry may raise serious questions, the independence and fairness of the Center appears to be maintained by appointing retired judges, law professors, and *bengoshi* of impeccable probity to serve as arbitrators. That the awards may be low, by American standards, is probably more a function of the overall system, as described above, than of the Center.

3. Finally, viewing the educational side of the Japanese legal system, it is noteworthy that in Japan, as in most nations other than the United States, law is an undergraduate discipline. This means that thousands of young people who have no intention of becoming lawyers may get exposed to education about their nation's legal system. Law courses may be taken as electives and, as at Hiroshima University, all education majors must take a course in constitutional law. It is ironic that in the United States, where we purport to elevate the Rule of Law to one of the nation's highest values, the traditional, virtually complete, isolation of the law school as a professional school has kept generations of college graduates from any meaningful education about their own legal system and has insured that undergraduate courses about law are the exception rather than the rule.

There are also, of course, some areas in which the Japanese might profitably import some American ideas, albeit with appropriate modifications:

a. First, there are virtues to widespread and numerically unlimited admission to the bar. The legal profession in the United States has become an important road to the achievement of access to all important values by members of minorities, recent immigrants, and economically disadvantaged groups. It has contributed to the democratization of the Nation and to the elimination or reduction of many forms of discrimination based upon race, religion, and sex. It has provided a powerful cadre of professionals who, given their understanding of our principal constitutional values and their access to the courts, can and do serve as a vast vanguard against constitutional abuses. In Japan, the mission of *bengoshi* is expressly to uphold human rights and realize social justice.<sup>29</sup> Indeed, the local bar association, as the author learned in Hiroshima, undertakes to protect civil liberties. However, because the entry into the profession is narrowly restricted, there are far too few *bengoshi* to satisfy the demand for litigation services at reasonable prices, and many of the most highly qualified graduates

29 See Kanter, *supra* n. 12, at 351, n. 63.

of law schools seek other careers. In consequence, there still remains serious question, of a kind expressed almost twenty-five years ago, whether the legal profession in Japan is adequate to provide the leadership and the representation necessary to support civil liberties provided for in the post-war Japanese Constitution.<sup>30</sup>

b. A related observation, though also not necessarily an original one,<sup>31</sup> is that while many law-educated college graduates serve as legal advisors without becoming licensed lawyers, and while most of them are very intelligent, indeed, the legal education to which they are exposed as part of their undergraduate program does not subject them to the rigorous analytical training typical in the American law school. Generally,<sup>32</sup> teaching is by the lecture method and there is little, if any, exchange between faculty and students. Students may evidently pass examinations without attending classes and there does seem to be considerable absenteeism, as attendance is not required in classes other than seminars. This raises the question whether this form of education is adequate to prepare students, particularly those who will become legal advisors without attending the Legal Training and Research Institute, to apply critical skills to the law and legal system or to apply law to facts in a legally sophisticated way. Quaere, therefore, whether the law, the legal system, judicial opinions, and other facets of the legal process in Japan receive the critical scrutiny, in particular cases or at large, that they deserve.

c. Finally, while Japan is likely never to achieve the levels of litigation of the United States, the factors which tend to close the courts to ordinary citizens — such as initial fees and filing costs based upon the size of claims — render Japanese courts and trial lawyers inaccessible to an extent which, regrettably, would be deemed outrageous in the United States.<sup>33</sup> Though many of the current critics of the American legal system might not agree, it is likely that the availability of the law suit to redress all manner of grievances against large corporations, large government, and other institutions which possess the power to injure and oppress, serves important, even vital, social values, not the least of which is as an important pressure valve and outlet for frustration.

Thus, while it is dangerous perhaps to draw overly simplistic comparisons between the two legal systems, there may be something which Japanese and Americans can learn from study of each other's systems, and some ideas that they can adopt, in whole or part, consistent with their unique cultures, for the betterment of each system.

30 Hattori "The Legal Profession in Japan: Its Historical Development and Present State" in A. T. Von Mehren, Ed., *op.cit.* supra n. 4, 149.

31 See Brown, supra n. 2, at 233, 236-37.

32 In Professor Matsumoto's Civil Law class, which he and I co-taught, we made a conscious effort to elicit discussion and questions from the students. Graduates students and older students in the class tended to be more responsive, but it seemed clear that most students were unaccustomed to participating in classroom discussion. It is likely in the future that greater participation will be required by Japanese law professors who, like Professor Matsumoto, have been exposed to legal education in the United States.

33 And probably unconstitutional. Cf. *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L.Ed. 2d 113 (1971).

# Partner-in-law



In these modern times, practising law may generate a lawyer's income. But running the law practice may have an even greater bearing on its success.

Now with special software designed to bring efficiency to the business of practising law, the IBM Personal Computer becomes a lawyer's tool for modern times.

How do you justify the investment? Just how does it pay its way?

It lets you concentrate on your income-generating skills by helping you get everyday time-consuming calculating, accounting or word processing tasks out of the way quickly, efficiently.

Your Personal Computer can find information, compare it, compute it, change it faster and more accurately than doing the jobs by hand.

Which makes trust accounting a breeze — not a chore.

This tailored programming package means your IBM Personal Computer can prepare timely customer statements, pinpoint overdue accounts and help you identify outstanding balances and improve your cash flow.

You can also use your Personal Computer to help control the cash your business pays out; let it help you automate key payables functions; take maximum advantage of discounts and update ledger accounts.

The IBM Personal Computer. Use it anywhere you want to cut costs, reduce paperwork and improve productivity in your business. While you get on with the business of practising law.

From Authorised IBM Dealers.

**IBM** Personal Computer

